

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS  
BOARD DIVISION OF JUDGES**

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UNITED STATES POSTAL SERVICE )

Respondent )

and )

LARRY PRETLOW )

An Individual )

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Cases: 5-CA-180590

**RESPONDENT’S POST-HEARING BRIEF**

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Respondent, United States Postal Service (“Postal Service” or “Agency”), pursuant to Section 102.42 of the Board’s Rules and Regulations, hereby submits its post-hearing brief.

**Summary of the Case**

Counsel for the General Counsel’s case is little more than the bare accusations contained in the complaint. Charging Party, Larry Pretlow was previously terminated, filed a grievance and was reinstated after prevailing at arbitration. Upon his return to work, he was terminated again. That is the sum and substance of the NLRB’s case. General Counsel produced no evidence of malice or ill-will toward Pretlow or any other evidence, such as statements of malice or hostility, even suggesting any retaliatory intent or hostility for Pretlow’s prior grievance activity. General Counsel presumes malice and nexus solely due to the timing of the recent termination, coming just a month after Pretlow was reinstated. Counsel’s indifference to the undisputed facts of the case, the realities of the work place, and Pretlow’s behavior (and lack of credibility) is shocking, especially for a member of the

government bar, ostensibly serving the public interest. This is a case that should never have been brought. The trial strategy was further reason for concern, as the presentation appears to have been based entirely on innuendo and supposition, rather than any attempt to prove a critical fact. Amazingly, Counsel chose to not even call the Charging Party as a witness in his own case.<sup>1</sup>

Charging Party, Larry Pretlow, was terminated shortly after he was reinstated, and that is no mere coincidence. But it is also not evidence of retaliation. Pretlow demonstrated repeatedly and most directly during his June 8, 2016 (routine) evaluation, that he lacks all self-control and is not fit for the workplace where feedback, even criticism, is a day-to-day necessity, especially for a probationary employee whose improvement depends on evaluation and correction.

The arbitrator who reinstated Pretlow admonished him for his behavior and urged him to demonstrate self-control. That's why the arbitrator ordered Pretlow to undergo a new probationary period; to prove that he is capable of composure and deserves the trust that is the basis for protected "career" status. Pretlow failed that test. That he demonstrated his inability to control himself quickly is not evidence of employer hostility, but evidence of Pretlow's underlying behavioral deficit. As with Occam's Razor, rather than presume the exotic (that Respondent harbored retaliatory motive despite all evidence to the contrary), the simplest answer (and the one proven by the evidence) is that the behavioral problems that lead to the arbitrator's warning is the same cause that lead to his subsequent failure. The idea that "timing" alone provides the answer is an abdication of any critical analysis.

And the timing factor actually works far more against Charging Party than in his

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<sup>1</sup> The plan to keep the Charging Party out of the hearing room during the case suggests rather strongly that Counsel could not trust her own client to maintain his composure even while simply watching the proceedings. This is a powerful indictment of his lack of self-control – which is precisely the reason he was terminated. Counsel's concern is a dramatic real-world corroboration of Respondent's case.

favor. He was angry from the outset that he was returned in a probationary status and sought to blame everyone involved, both union and management, and likely the arbitrator too. So he had a chip on his shoulder as soon as he walked back into the door upon reinstatement. More powerfully than anything else, Pretlow's own words prove that he was angry, made threats, and refused to accept or even listen to criticism upon his return to the workplace. The timing of Respondent's actions was dictated by Pretlow's immediate hostility. General Counsel may choose to ignore this. But the Judge certainly cannot.

Respondent had ample reason to terminate Pretlow, based solely on his bizarre behavior during the June 8 evaluation. General Counsel and Pretlow himself deny this and deny the factual claims about that meeting. Respondent sought to corroborate the claims about that meeting not only by multiple accounts of what took place then, but also by describing similar outbursts both before and after the June 8 meeting. This effort wasn't made to suggest additional uncharged reasons for termination. Rather, this effort was made to show that Pretlow's behavior then (which he denied) was consistent with how he has behaved repeatedly at other times and in the same way the arbitrator cautioned him about. This wasn't "new" or "shifting" reasons, but simply corroboration of the June 8 allegations. There's a difference.

Respondent was stymied in its efforts to prove its case based mostly on General Counsel's myopic view of appropriate evidence. Not surprisingly, General Counsel wants to exclude all evidence of Pretlow's propensity to "go nuts" whenever criticized or even questioned about work. If Respondent's allegations of Pretlow's June 8 behavior were admitted by the GC, then proof of similar conduct at other times might indeed be irrelevant. But, GC contests the allegations and claims they didn't occur. Because of that contest, evidence tending to show similar behavior under similar circumstances is completely

relevant. And we are not dealing with an uninformed or easily-mislead jury who needs protection from inconvenient facts or potential “prejudice.” Here, there is abundant evidence that Pretlow has a tendency - more than that, a propensity – to become outraged at the slightest provocation or even when there is no provocation at all except his own subjective interpretation of events. His view, for example, that he was being harassed or “set up” because his supervisor, Reber Chergosky sent him text messages such as: “Have a Nice Day” is a perfect example of his odd subjective views, about which he then overreacts. This propensity animates his behavior and corroborates the accusations against him about June 8. If the Judge accepts those allegations as true, then the corroboration evidence is indeed unnecessary. But, if there is any question about whether Pretlow acted as described, then Respondent’s corroborative evidence is not only relevant, but crucial to resolving the conflicting claims. It also shows that Pretlow is a menace to the workplace, however. And this should not be ignored, especially in this day and age where violence is all too common, but can sometimes be prevented.

There is not a “scintilla” of evidence of any hostility toward Pretlow by management. There is no nexus at all between Pretlow’s termination and any past or current protected activity. To the contrary, Pretlow’s immediate supervisor (Reber Chergosky or “Reber”) went out of her way to provide friendly coaching and encouragement to Pretlow. She often provided him positive feedback even if she also had to mention minor short-comings. Pretlow rejected all of it, both good and bad, and accused her of being in cahoots with the union and with upper management to get rid of him. The facility manager (Shakeel Khan), tried to stay away from Pretlow as much as possible so as not to antagonize him. But even a minor comment by Mr. Khan (to Reber) about the need to provide additional assistance to Pretlow to get the mail delivered on time was interpreted by Pretlow as a blatant attempt to

ridicule him in the eyes of his peers. That's absurd.

General Counsel spins two other innocuous events into disparate treatment claims, but in order to do so has to ignore reality as though rules that apply to everyone don't apply to Pretlow. General Counsel claims that no other carriers were given evaluations, but that when evaluations did occur, they were conducted on the work floor and not in a private office. This would be the alleged smoking gun proving disparate treatment, proving ill-will. Hardly.

All career carriers and all city carrier associates (CCAs – non-career employees) are required to serve a 90-day probationary period that includes 30/60/90 day evaluations. CCAs who “convert” to career status also must complete a second probationary period – if converted within 2 years of hire. That was Pretlow's case. So he had to be given evaluations both because of the conversion and because he was serving a probationary period due to the arbitrator's award. No other carriers had had such evaluations because there had been no other similar CCA-Career carrier conversions at the facility. The CCA classification was new and the opportunity for such conversion/evaluation had not come up yet in such a small office. So the absence of prior examples is utterly innocuous and not disparate treatment at all.

As for the location of Pretlow's evaluation (in the office), that is easily explained by Mr. Pretlow's recently expressed outrage that his performance had been discussed on the workroom floor. Imagine how he would have responded if his evaluation had taken place openly. The location is itself innocuous but even if it was different than others, there was ample justification for that.<sup>2</sup>

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<sup>2</sup> Martin claims these meetings usually took place on the floor. But he is talking about a different kind of meeting altogether, one where just the training form with the checkboxes was discussed, usually briefly and requiring his signature. That's not the same kind of meeting as the Form 1750 evaluation meeting, where union representatives are most often not present. Martin really wouldn't know where such meetings always took place, since he did not attend them.

Boiled down to the most basic elements, Larry Pretlow was terminated for his erratic, abusive, and potentially violent behavior on June 8 during his evaluation. While there are some minor conflicting claims about the meeting, one witness provided the most compelling and reliable description of the meeting and the reasons for Pretlow's termination – Reber Chergosky. She candidly described how Pretlow reacted during the meeting when she tried to describe Pretlow's progress and the satisfactory and unsatisfactory remarks about his work. According to Reber, Pretlow became enraged, yelled and screamed, threatened that he wasn't going to take this and had friend in high places, banged his fists on the desk, banged the walls and the doors, and ranted and raved repeatedly, so much that the union steward had to take him out into the hallway to calm him down. This behavior commenced almost from the first comments about Pretlow's progress and was repeated with the few questions/comments that followed. Reber explained that Pretlow's screaming, banging, waving his arms scared her and made her feel unsafe in his presence. She also could not complete the evaluation due to Pretlow's repeated outbursts. As a result, she decided to terminate Pretlow and prepared the explanatory termination document. To the extent necessary to corroborate Pretlow's penchant for this type of behavior, Reber also prepared notes of the incident the following day, when Pretlow was given the termination and "went nuts" engaging in worse behavior, which he himself described as a "nervous breakdown" where the police were summoned and Pretlow was removed on a stretcher by an ambulance and taken to the hospital for psychiatric evaluation.

These are incidents that are utterly improper in the workplace. Ms. Chergosky's decision to terminate Pretlow was completely justified. She also had no knowledge of Pretlow's past grievance activity. Regardless of Pretlow's past protected conduct, it played no role whatsoever in his termination, nor would such prior activity have changed anything.

Pretlow would have been terminated regardless of his past grievance activity.

## **FACTS**

Charging Party Larry Pretlow was a probationary letter carrier who had been reinstated after prevailing at arbitration related to an earlier termination. Tr. 28-29; GC-2. He was originally hired in 2013 as a city carrier associate, became a career letter carrier and was terminated in February 2015, and then returned to work in May 2016 as a carrier. GC-2

Because he returned in a probationary status, and because Pretlow was a CCA who had converted to a career carrier within two years of employment, he had to be given evaluations during his probationary period. Tr. 31-33, 100-0, 134-35. His first evaluation would be at the 30-day mark.

Mr. Khan had not been involved previously in evaluations of other CCAs who converted to career carrier status because there had not yet been such conversions, as the CCA position and the conversion situation were somewhat new. In this regard, Pretlow's requirement to be given an evaluation was no different than other employees. Tr. 33, 136-138<sup>3</sup>. Pretlow initialed the 1750 evaluation form showing him the job expectations as soon as he arrived on May 4, 2016. GC-3.

During Pretlow's first 30 days, he had several delivery errors and he was also absent or late several times and this was a concern to Reber Chergosky, his supervisor. Tr. 261-62, 267-73. Reber spoke to Pretlow about this, but he consistently got angry and upset and raised his voice whenever she tried to address these issues with him. She stated that these were things that other new employees could be fired over, but she was trying to work with him instead and improve his performance. Tr. 268, 274-76.

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<sup>3</sup> Khan testified that a list of CCAs who had not been given evaluations were not "converted" to career carrier positions and therefore they would not have had evaluations, and were not similar to Pretlow. Tr. 99-100; GC-7

When Pretlow's 30-day evaluation came up, Chergosky had a few minor items to bring to Pretlow's attention (attendance/delivery errors) but she had no plan or inclination to take any kind of disciplinary action. She expected the evaluation to be routine, but needed to bring the corrections to Pretlow's attention. Tr. 274-76.

This was Reber's first evaluation meeting and Mr. Khan agreed to accompany her both to assist and answer any questions and to be there to make sure things went smoothly with Pretlow. Tr. 139-140. The expectation was that the meeting would be routine and they would wait for the next meeting at 60 days. Tr. 140-141. There was no consideration of firing Pretlow at that point. "Not at all." Tr. 142. Reber was reluctant to meet with Pretlow alone because of how he had acted previously when she tried to raise performance issues with him. Tr. 142-43. They invited the union steward to attend for the same reasons.

During the meeting, Chergosky tried to describe minor short-comings about his attendance and delivery errors in order to improve his performance. Tr. 281-88. He first started yelling and screaming, then pounded his hands and fists on the table, then got up and pounded the doors and walls and was eventually taken outside into the hallway by union steward Dwayne Martin to try to calm him down. Tr. 286. Upon his return and mention of the next item on the evaluation list, Pretlow went off again, yelling, ranting and raving, and banging the table and door. The union steward had to end the meeting as Pretlow was clearly out of control and could not continue. Tr. 289.

Reber described the meeting and Pretlow's behavior in detail. She said at the first mention of an unsatisfactory comment about the first item on the list Pretlow started yelling that management was doing this to him all over again, that he wasn't going to take it, that he had friends in higher places. He began screaming, waving his arms, then pounded the desk,



door and walls. She was shaken and scared of what he might do to her. Tr. 285-86. After Martin took Pretlow out into the hall to calm him down, and they returned, at the mention of the next question, Pretlow began the same angry, raging behavior again, screaming, banging, and yelling. Tr. 286-87. At that point, Martin suggested that they could not continue with the meeting, Pretlow was already up and leaving, so Reber and Khan agreed the meeting was over. Tr. 289. Reber explained that there was nothing that she or Khan did or said to provoke this behavior and that she had never witnessed anything like this before. Tr. 291-92. Khan confirmed all of these claims in his testimony. Tr. 139-149.

Although the union steward down-played Pretlow's actions, he agreed that Pretlow had been upset and that he took Pretlow out of the room to calm him down (calm down the situation). Tr. 48. Martin agreed that Pretlow (at various times) was under duress and lashed out at everybody, including the union. Pretlow had accused Martin and the union of improper treatment, and threatened to sue. Tr. 76, 78-81. Related to the evaluation meeting, Martin testified that Pretlow said: "I cannot take this" and left the meeting. Tr. 83.

Ms. Chergosky was shaken and afraid of Pretlow based on his actions and demeanor during the evaluation. Tr. 293. She decided that she could not work with him if he was going to behave this way, so she decided to terminate him. Tr. 294-96. Chergosky initiated termination that evening and she prepared the termination document that evening. GC-4.

Khan described Pretlow's behavior as bizarre, outrageous and disruptive – even menacing and violent. Tr. 139-149. He described how Pretlow almost immediately became angry, outraged and threatening about the meeting itself. He testified about how Pretlow yelled and screamed, pounded the table, pounded the walls and doors and then went out into the hall, and pounded the walls and doors there, while the union steward tried to calm him down. Khan said he had never experienced anything like Pretlow's behavior and that he was alarmed by it

and felt it was threatening and violent. Tr. 149. Although he said he felt the behavior was grounds for termination, he left that decision up to the supervisor, Reber Chergosky. Tr. 150-53.

Charging party asserts that none of this happened and that he was completely innocent of any misbehavior or any emotional outburst at all during the evaluation. Instead, he claims that it was his union steward, Dwayne Martin, and the facility manager, Shakeel Khan, who had a heated altercation and that he, Pretlow, took Mr. Martin out into the hall to calm him down. Tr. 224-25. He also claimed that Martin and Khan were in cahoots, colluding together to stage a scene so that Martin could pretend to have an altercation that management then could blame on Pretlow. Tr. 226-27. Martin of course denies this, as do the other witnesses.

The union representative (Martin) down-played the events at the evaluation, suggesting that they were no worse than other (unspecified) instances of angry confrontations he had witnessed. Nonetheless, Martin acknowledged that he had to take Pretlow out of the room repeatedly to calm him down, that he (Martin) had not been the one to have an angry confrontation with Khan (as Pretlow alleged), and that the meeting had to be terminated due to the disturbance.

It must be noted that Pretlow had repeatedly threatened Martin and the union (Tr. 76) that he would sue them for collusion with management and all sorts of other alleged offenses. Martin himself had reacted to Pretlow's threats and angry accusations with his own choice words and a refusal to help Pretlow further. Tr. 79.<sup>4</sup>

June 9, Pretlow reacted to the termination letter by behaving in an even more extreme

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<sup>4</sup> It appears likely that at least on some level, Pretlow's threats against Martin and the union may have cowed Martin into submission and prompted him to attempt to be supportive of Pretlow's NLRB claims against the employer, at least somewhat. Martin's testimony, as a result, must be taken with a grain of salt – recognizing his conflicting duty to protect himself and the union from further harm from Pretlow, while also having to testify truthfully about the events of June 8, 2016. Down-playing those events by describing them less vividly appears to have become the accommodation of those conflicting priorities.

manner, culminating in the police being summoned and an ambulance taking Pretlow away on a stretcher to the hospital for a psychiatric assessment. Tr. 52-53; 167-73; 299-308; R-2; R-3.

Unfortunately, Pretlow's reaction to the pending termination caused him to react in an even more extreme way, ultimately ending with the union steward (and Chergosky) calling the police, and an ambulance removing Pretlow from the premises in restraints and taking him to the hospital for psychiatric evaluation. R-2; R-3.

It appears Mr. Pretlow suffers from some type of paranoia or other fear of persecution. He repeatedly makes all manner of outrageous accusations without evidence or justification. He also appears to have a habit of grossly exaggerating events in an effort to convince his audience. See, for example, R-4, R-5, R-6, ad R-7.

### **Analysis and Conclusion**

Based solely on the facts outlined in Pretlow's termination letter, there was ample just cause for Pretlow's termination. He demonstrated that he was both a threat to the workplace and that he would not subject himself to any kind of coaching or constructive criticism. Aside from any previous or subsequent behavior, Pretlow's conduct at the evaluation meeting alone justified his removal.

Pretlow was angry and suspicious about being subject to a new probationary period, and despite that this was ordered by the arbitrator, Pretlow threatened his union for this outcome. He accused his union of collusion with management and vowed to sue or go to Congress. (He did both.)

Pretlow was outraged at every perceived slight. On May 31, he needed some assistance finishing his deliveries. This was not unusual and was no cause for alarm by

management given that it was right after a holiday, when mail volume would be increased due to the day off. Mr. Khan mentioned to Reber that she needed to document the added assistance in the system related to Pretlow's route. Khan didn't even mention Pretlow by name, but the mere fact that Khan mentioned this on the floor and suggested some slowness by Pretlow was enough to set Pretlow off. He accused Khan of repeatedly and intentionally humiliating him in public as a continuing effort at harassment. R-4.

His conduct on June 8 fits into that same mold: gross overreaction to a perceived slight. As Khan said, Pretlow "went nuts" and acted like a crazy person, ranting and raving, slamming and pounding his fists on the table and walls and doors, kicking the walls and doors and screaming and threatening the managers. He accused his union representative of being in cahoots with management by staging an altercation as a pretext to get rid of him. He exhibited even more extreme and bizarre behavior on June 9 when the termination paper was shown to him. But Pretlow accepts responsibility for none of this. In his view, he is the victim of a concerted plot.

No doubt, General Counsel will claim that Pretlow was right: the evaluation was a set-up and was disparate treatment, and that the termination decision was a pre-ordained act of retaliation by Khan due to Pretlow's prior grievance activity (and being reinstated after arbitration). There is no evidence to support that theory however. There is not one iota of evidence of malice or hostility by management toward Pretlow after his return on May 4, 2016. There was no word or deed suggesting any ill-will toward Pretlow (unless Pretlow's claim can be believed that Reber was harassing him by sending him text messages such as "have a nice day").

General Counsel attempts to create malice out of ordinary procedures. She claims that

Pretlow shouldn't have been evaluated and that the location was suspicious. Both claims are nonsense. Pretlow was required to be evaluated by the terms of his probation status, whether due to the CBA or the arbitrator's explicit order. The location of the evaluation is irrelevant, and was certainly to Pretlow's advantage given his outrage at having his issues discussed more publicly on the work floor. There is no disparate treatment, and therefore no evidence of any malice, which is essential to show a nexus between Pretlow's grievance and his termination.

General Counsel will have to rely on the vague and self-serving testimony of Martin to claim that Pretlow's behavior during the June 8 evaluation wasn't that bad. Arguably, the accounts of Khan, Martin and Pretlow could be subject to challenge due to their pre-existing roles and/or alleged bias. What is not subject to debate, however, is the unbiased and candid testimony of supervisor Reber Chergosky. Reber had no history with Pretlow, did not know anything about his past and repeatedly tried to reassure Pretlow that he had a clean slate with her and that whatever his past may have been, she was looking only at his current performance and attitude. Her texts to him, to have a good day, etc., were nothing more than heart-felt encouragement. Reber's testimony clearly shows that Pretlow is a menace in the workplace. Based on her testimony alone, General Counsel's case must be dismissed as without merit.

In order to establish a violation under Section 8(a)(3) and (1) in accordance with the Board's decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected conduct was a motivating

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factor in the employer's decision. See *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996),  
enfd. 127 F.3d 34 (5th Cir.1997). The General Counsel can meet this burden by proving  
the employee's union activity, the employer's knowledge of the union activity, and the  
employer's animus against the employee's protected conduct. Once this showing is made,  
the burden of persuasion “shift[s] to the employer to demonstrate that the same action  
would have taken place even in the absence of the protected conduct,” *Wright Line*, 251  
NLRB at 1089. See also, *USPS v. Shelley Oglesby*, 07-CA-170211 (4/18/2017 – ALJ  
rejects alleged retaliation and threats by probationary employee terminated for misconduct  
during 30-day evaluation meeting).

Here, there is no nexus whatsoever between Pretlow’s prior grievance activity and  
his subsequent termination. There is no evidence of hostility at all. Rather, the only  
evidence comes from an inference that the “timing” makes the discipline suspect. But that  
inference is improper here where Pretlow’s own behavior and nothing more is what lead to  
his termination. The timing was of Pretlow’s own making. Once he went back to work, he  
wasted no time in acting in a bizarre and threatening manner. In his current state, he is not  
fit for the workplace. Without proof of animus and evidence that Pretlow would not have  
been terminated “but for” his protected conduct, General counsel’s case must be rejected.

## **Conclusion**

The General Counsel has failed to meet its burden of establishing that Respondent's actions were illegally motivated in any way, and has further failed to establish that Pretlow's allegation of retaliation is credible. As such, Respondent respectfully requests that this complaint be dismissed.

Dated this 21st day of July, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing **Respondent's Post-Hearing Brief** were sent this 21st day of July, 2017, as follows:

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